Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1776–08 OF 2013
MOHAMAD ARIFF, HAMID SULTAN AND ABANG ISKANDAR JJCA
28 AUGUST 2014

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Civil Procedure — Limitation — Action against advocate for negligence — Counsel failing to attend court for hearing — Whether action against counsel time barred — Whether cause of action arose on date of failure to attend court or when opportunity to file afresh/reinstate was lost — Whether cause of action to 'sue for loss of chance' commences immediately

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Civil Procedure — Pleadings — Parties bound by — Court not to decide on matter not pleaded — Whether omission fatal

E

Legal Profession — Advocate and solicitor — Professional negligence — Counsel failing to attend court for hearing resulting in suit being struck out — Whether action against counsel time barred — Whether cause of action arose on date of failure to attend court or when opportunity to file afresh/reinstate was lost — Whether cause of action to 'sue for loss of chance' commences immediately

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Tort — Negligence — Professional negligence — Legal profession — Counsel failing to attend court for hearing resulting in suit being struck out — Whether action against counsel time barred — Whether cause of action arose on date of failure to attend court or when opportunity to file afresh/reinstate was lost — Whether cause of action to 'sue for loss of chance' commences immediately

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The respondent's (the plaintiff) claim against the appellant (the defendant) related to the appellant's professional negligence as the respondent's solicitor in not attending court on the day of hearing. This had resulted in the suit being struck out on 29 May 2006. The cause of action in the struck out suit had arisen on 12 November 2000 and the action had become time barred on 12 November 2006. The present suit was filed on 4 October 2012. The appellant claimed that the cause of action in the present suit arose on 29 May 2006 and that it became time barred on 28 May 2012. The learned judicial commissioner held that in negligence, the cause of action only arises at the time the respondent suffers damage and held that this only arose on 12 November 2006 ie when the opportunity to file afresh and/or reinstate was lost. The appellant appealed against that decision and the respondent cross-appealed in

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relation to the interest awarded on the judgment sum, which was 5%pa. The respondent claimed it must be the contractual interest of 1.5% per month from 12 November 2000.

Held, allowing the appeal and dismissing the cross-appeal with costs of RM100,000:

(1) When a matter is struck out there will be at least two types of damages for the client. One is actual damage for costs to reinstate or refilling inclusive of instructing new solicitors to take conduct of the matter as the case may be and the other the 'loss of chance to sue'. To say 'actual damage' will not arise upon the case being struck out is a fact quite difficult to comprehend. However, on the second part of 'loss of chance' there will not be any liability if there is no actual loss and/or reasonable prospect of success (see para 9).

(2) It is trite judgment must reflect the pleadings and more so when 'limitation' is taken as an issue. The date 12 November 2006 was not mentioned in the statement of claim to enable the respondent to prove the cause of action fell within the limitation period. This was fatal to the respondent's case (see paras 13–14).

(3) The cause of action for professional negligence arose when the suit was struck out on 29 May 2006. The respondent only commenced the instant suit on 4 October 2012 after six years. The respondent's argument that notwithstanding the suit was struck out on 29 May 2006, it could still be filed afresh or reinstated before the cause of action in the suit expired on 12 November 2006 had no merit. This was not a case of latent defect (see para 22(a) & (b)).

(4) In cases relating to solicitor's negligence where the court has struck out the suit, the cause of action to 'sue for loss of chance' will commence immediately and it cannot be dependent on other factors when there is a limitation deadline in law that had to be met. Further, in the event the respondent had commenced the action within the six years period and the action was reinstated or allowed to be refiled there is nothing stopping the respondent to still proceed to claim damages for negligence in respect of all costs, etc involved (see para 22(e)).

[Bahasa Malaysia summary

Responden (plaintif) menuntut terhadap perayu (defendan) berkaitan kecuaian profesional perayu sebagai peguamcara responden kerana tidak hadir ke mahkamah pada hari perbicaraan. Itu telah menyebabkan guaman tersebut dibatalkan pada 29 Mei 2006. Kausa tindakan dalam guaman yang telah dibatalkan telah dibangkitkan pada 12 November 2000 dan tindakan itu telah menjadi terhalang oleh had masa pada 12 November 2006. Guaman semasa difailkan pada 4 Oktober 2012. Perayu mendakwa bahawa kausa tindakan

dalam guaman semasa timbul pada 29 Mei 2006 dan bahawa ia menjadi terhalang oleh had masa pada 28 Mei 2012. Yang Arif pesuruhjaya kehakiman memutuskan bahawa dalam kecuaian, kausa tindakan itu hanya bermula pada masa responden mengalami kerugian dan memutuskan itu hanya timbul pada 12 November 2006 iaitu apabila peluang untuk memfailkan semula dan/atau mengembalikan semula telah hilang. Perayu merayu terhadap keputusan itu dan responden menuntut balas berkaitan dengan faedah yang diawardkan untuk jumlah penghakiman, yang mana adalah 5% setahun. Responden menuntut ia bahawa faedah kontraktual sebanyak 1.5% sebulan dari mestilah 12 November 2000.

Diputuskan, membenarkan rayuan dan menolak tuntutan balas dengan kos sebanyak RM100,000:

(1) Apabila suatu perkara dibatalkan akan ada sekurang-kurangnya dua jenis kerugian kepada pelanggan. Satu adalah kerugian sebenar untuk kos untuk mengembalikan atau memfailkan semula termasuk mengarahkan peguamcara baru untuk mengambil alih perkara itu sebagaimana kes berkenaan dan yang lain adalah 'loss of chance to sue'. Untuk mengatakan 'actual damage' tidak timbul apabila kes dibatalkan adalah fakta yang sukar difahami. Walau bagaimanapun, pada bahagian kedua terhadap 'loss of chance' tidak akan ada tanggungan jika tiada kerugian sebenar dan/atau prospek terhadap kejayaan yang munasabah (lihat perenggan 9).

(2) Ia adalah menjadi kebiasaan penghakiman hendaklah menggambarkan pliding dan lebih-lebih lagi apabila 'limitation' dijadikan sebagai suatu isu. Tarikh 12 November 2006 tidak disebut di dalam tuntutan untuk membolehkan responden untuk membuktikan kausa tindakan terangkum dalam had masa. Ini adalah fatal terhadap kes responden (lihat perenggan 13–14).

(3) Kausa tindakan untuk kecuaian profesional timbul apabila guaman dibatalkan pada 29 Mei 2006. Responden hanya memulakan guaman pada 4 November 2012 selepas enam tahun. Hujahan responden bahawa meskipun guaman dibatalkan pada 29 Mei 2006, ia masih boleh difailkan semula atau dikembalikan semula sebelum kausa tindakan guaman tamat tempoh pada 12 November 2006 tidak bermerit (lihat perenggan 22(a) & (b)).

(4) Dalam kes-kes berkaitan dengan kecuaian peguamcara yang mana mahkamah telah membatalkan guaman, kausa tindakan untuk 'sue for loss of chance' akan bermula serta-merta dan ia tidak boleh bergantung pada faktor-faktor lain apabila terdapat batas waktu dalam undang-undang yang perlu untuk dipenuhi. Selanjutnya, dalam keadaan responden telah memulakan tindakan dalam tempoh enam tahun dan tindakan itu telah dikembalikan semula atau dibenarkan untuk difailkan

tiada apa-apa yang menghalang responden untuk terus meneruskan tuntutan ganti rugi untuk kecuaian berkaitan kesemua kos, dan lain-lain yang terlibat (lihat perenggan 22(e)).]

Notes

For a case on professional negligence, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 1435.

For cases on parties bound by pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6840–6846.

For cases on professional negligence, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 1459–1549.

Cases referred to

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784, CA (refd)

Backer v Ollard and Bentley (a firm) (1982) 126 Sol Jo 593, CA (distd)

Blay v Pollard and Morris [1930] 1 KB 628, CA (refd)

Hamlin v Edwin Evans (a firm) (1996) 29 HLR 414, CA (refd)

Mount v Barker Austin [1998] PNLR 493, CA (refd)

Nykredit Mortgage Bank plc v Edward Erdman Group (No 2) [1997] 1 WLR 1627, HL (distd)

Recaliva Design Steel (M) Sdn Bhd v Vista Access Sdn Bhd [2008] 6 MLJ 604, HC (refd)

Sharif v Garrett & Co (a firm) [2002] 1 WLR 3118, CA (refd)

Watkins v Jones Maidment Wilson (a firm) [2008] PNLR 23; [2008] EWCA Civ 134, CA (refd)

Legislation referred to

Latent Damage Act 1986 [UK]

Limitation Act 1953 s 6

Appeal from: Civil Suit No 23NCVC-118–10 of 2013 (High Court, Kuala Lumpur)

Lim Kian Leong (Carole Ngu with him) (Lim Kian Leong & Co) for the appellant.
Liow Si Khoon (Hiew Ka Ying with him) (Liow & Co) for the respondent.

Hamid Sultan JCA:

[1] The appellant's ('the defendant') appeal and the respondent's ('the plaintiff') cross-appeal which relates to professional negligence of solicitor in not attending court on the day of hearing which resulted in the suit being struck out came up for hearing on 7 and 23 April 2014. Upon hearing the parties we reserved judgment. My learned brothers Mohamad Ariff bin Mohd Yusof JCA and Abang Iskandar bin Abang Hashim JCA have read the judgment and approved the same. This is our judgment.

PRELIMINARIES

[2] At the outset we must say the learned judicial commissioner had dealt with the issues meticulously and written a comprehensive judgment. The complaint by the appellant is related to (a) the defence of limitation; and (b) the allegation that the respondent has no reasonable prospect of success against SK Styrofoam ('the purported debtor') and therefore suffered no actual damage.

[3] The respondent's cross-appeal is related to the interest awarded on the judgment sum, which was 5%pa but the respondent says it must be the contractual interest of 1.5% per month from 12 November 2000.

UNDISPUTED FACTS

[4] The cause of action against the purported debtor arose on 12 November 2000 and the action will become time barred on 12 November 2006. The striking out of the suit was done on 29 May 2006.

[5] The present suit was filed on 4 October 2012. The cause of action the appellant said arose on 29 May 2006 and it would have been time barred on 28 May 2012. However, the learned judicial commissioner says in negligence the cause of action only arises at the time the respondent suffers damage. And asserts further, that will only arise on 12 November 2006 ie when the opportunity to file afresh and/or reinstate is lost. That part of judgment reads as follows:

> [23] Now, I will consider the issue of limitation raised by the defendant. In a claim for negligence, the cause of action accrues when the plaintiff first suffers damage. I have alluded to this principle and examined it in some detail in my earlier judgment in *Kobchai Soothikul (representative of the estate of Boonsom Boonyanit @ Sun Yok Eng, deceased) v Pengarah Tanah dan Galian, Pulau Pinang* [2012] 3 MLJ 297 at pp 317–319). This principle was aptly summarised by Templeman LJ, writing for the English Court of Appeal in *Baker v Ollard & Bentley (a firm) & Anor* (1982) 126 Sol Jo 593, in the following terms:
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> > The period of limitation under the Limitation Act 1939 begins to run when the cause of action accrues. In negligence actions damage is an essential part of the cause of action and thus the relevant period of limitation, in this case six years, runs from the date of the damage and not from the date of the act which causes the damage.
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> [24] The same principle was reiterated by Lord Nichols of Birkenhead in *Nykredit Mortgage Bank plc v Edward Erdman Group (No 2)* [1997] 1 WLR 1627 when he said:
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> > In cases in tort the cause of action arises not when the culpable conduct occurs, but when the plaintiff first sustains damage.

[25] The date when limitation set in is very much fact based and varies from case to case depending on the peculiarity of each case. The date of the culpable act and the date on which damage is first suffered need not be the same. In the instant case, the date of the culpable act of not attending court leading to the suit being struck out was 29 May 2006. On that date, I find that the plaintiff did not suffer any damage yet, as there still existed the opportunity to file a fresh claim against SK Styrofoam before limitation set in. There was also the possibility of an application being made by the defendant in a timely manner to reinstate the suit.

[26] According to the statement of claim in the suit, the cause of action against SK Styrofoam arose on 12 November 2000; and that means, that action would become statute barred on 12 November 2006. Therefore, there was a window of slightly more than five months from the date the suit was struck out, for the defendant to file a fresh suit against SK Styrofoam. However, the defendant failed to do this; nor did the defendant advise the plaintiff of the possible options available to keep alive the action against SK Styrofoam. Once limitation set in on 12 November 2006, the plaintiff has suffered damage, as that is the date on which the plaintiff has completely lost its cause of action to recover the sum owed by SK Styrofoam.

[27] Therefore, I am of the view that based on the peculiar facts and circumstance of this case, the plaintiff's cause of action in negligence against the defendant accrued on 12 November 2006 and would have expired on 12 November 2012. This action was filed on 4 October 2012, thus well within the six years limitation period prescribed in s 6 of the Limitation Act 1953.

REASONABLE PROSPECT OF SUCCESS

[6] Before we deal with the case it must be noted that the law related to negligence of solicitor and assessment of quantum for reasonable prospect of success has always been challenging and one must be careful not to stride into indemnity principle as the measure for the failure of solicitor attending court and having the case struck out. There are many uncertainties and/or contingencies the court has to take into consideration in relation to the success of the client's case against third parties and also the conduct of the client in not pursuing the case by regularly not having his own diary to check the movement of the case from time to time. In this time and era, just to say that the case is being handled by the solicitor in litigation matter without knowing the status of case management or hearing dates and not taking keen interest in the litigation process may not end up in the court granting quantum on indemnity principle or near to it. It must not be forgotten litigation is a joint effort of the solicitor and client and both parties have to show interest in the litigation process or take necessary steps promptly to maintain their status quo.

[7] There are authorities to suggest that in a case of this nature the respondent still has to prove his case against the third party on the balance of probabilities. This was not done in this case. In *Sharif v Garrett & Co (a firm)* [2002] 1 WLR 3118, the court with similar issues had relied on Lord Justice Simon Brown in *Mount v Barker Austin* [1998] PNLR 493 at pp 510–511,

where His Lordship had summarised the relevant consideration as follows: A

> (i) The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim, he has lost something of value ie that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success.
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> (ii) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.
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> (iii) If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay would have caused such difficulty and quite possible, indeed, that that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.
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> (iv) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible, it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure.
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> These principles are largely taken from the leading cases of *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 and *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 and have been applied in a number of cases to which we were referred. But there is no authority which gives any guidance as to how the court should approach its task in a case where the original claim has been struck out because a fair trial of the issue or issues in question was no longer possible as a result of delay by the claimant's solicitors. We have been asked to give guidance because we are told that such cases are typical of those made against solicitors.
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A LIMITATION DEFENCE AND 'REASONABLE PROSPECT OF SUCCESS'

[8] In negligence the cause of action starts from the date of damage is a good proposition of law but it may not apply to cases where you can sue for damages immediately (see *Watkins v Jones Maidment Wilson (a firm)* [2008] EWCA Civ 134; [2008] PNLR 23). In a case for 'loss of chance to sue' there is no reason to defer the action. The status will be the same whether or not the action is deferred. The distinction is like apple and orange and we will deal with this issue further in the judgment.

[9] In addition, it must be noted when a matter is struck out there will be at least two types of damages for client. One is actual damage for costs to reinstate or refilling inclusive of instructing new solicitors to take conduct of the matter as the case may be and the other the 'loss of chance to sue'. To say 'actual damage' will not arise upon the case being struck out is a fact quite difficult to comprehend. However, on the second part of 'loss of chance' there will not be any liability if there is no actual loss and/or reasonable prospect of success as advocated in the submission of the appellant.

RULES OF PLEADING

[10] When limitation issues are taken, the pleadings must be meticulously looked into. In the instant case the respondent prayer in the statement of claim states as follows:

> (18) Kedudukan plaintif jelas diprejudiskan dan kini tuntutan plaintif untuk RM154,283.00 terhadap Styrofoam bersama dengan faedah dan kos telah dihalang oleh had masa. Kesemua ini adalah disebabkan oleh kecuaian professional defendan yang tidak dapat dinafikan. Butir-butir kecuaian defendan adalah seperti berikut:
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> a. Gagal menghadiri Perbicaraan Penuh dan/atau Pengurusan Kes pada 01.03.2005, 28.03.2006, 29.05.2006 dan 28.05.2006;
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> b. Gagal berinteraksi dengan pihak plaintif dan memaklumkan pihak plaintif berkenaan dengan perkembangan terkini Saman tersebut;
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> c. Gagal melaksanakan perkhidmatan profesionalnya dan membuat penyediaan berkenaan dengan saman tersebut bagi tujuan perbicaraan penuh;
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> d. Gagal menyedari bahawa saman tersebut telah dibatalkan; dan
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> e. Gagal membuat permohonan untuk menghidupkan semula saman tersebut atau memfailkan satu saman baru sebelum tuntutan plaintif dihalang oleh had masa.

(19) Disebabkan kecuaian-kecuaian profesional defendan, kini plaintif tidak lagi mempunyai peluang dan dihalang oleh Seksyen 6 Akta Had Masa 1953 untuk membuat tuntutannya yang benar dan tulen terhadap Styrofoam, dan telah mengalami kerugian sebanyak RM154,283.00, yuran Guaman sebanyak RM4,025.00 dan faedah.

(20) Encik Soo bagi pihak plaintif telah membuat satu aduan terhadap defendan di atas kepada Lembaga Tatatertib Peguam-Peguam [No. Aduan: DB/11/6548] pada tahun 2011 ('Aduan tersebut') dan satu Perintah telah dikeluarkan pada 09.12.2011 oleh Lembaga Tatatertib Peguam-Peguam bahawa defendan dikehendaki untuk membayar dendaan sebanyak RM5,000.00 kepada Lembaga Tatatertib Peguam-Peguam.

(21) Oleh yang demikian, plaintif memohon untuk perintah-perintah seperti berikut terhadap defendan:–

a. Deklarasi bahawa defendan telah melakukan kecuaian profesional ('Professional Negligence') semasa mengendalikan Saman tersebut;

b. Penghakiman terhadap jumlah RM154,283.00;

c. Faedah sebanyak 1.5% sebulan terhadap RM154,283.00 dari 12.11.2000 sehingga tarikh pembayaran penuh;

d. Yuran Guaman sebanyak RM4,025.00;

e. Gantirugi am;

f. Kos guaman tindakan ini;

g. Kos tindakan ini; dan

h. Lain-lain perintah yang difikir wajar dan sesuai oleh Mahkamah Yang Mulia ini.

[11] From the pleadings it is clear that the respondent is seeking general damages. General damages will include costs involved to reinstate as well as quantum for 'reasonable prospect of success' in cases of this nature.

[12] What is important to note is that the complaint is in reference to a number of dates in prayer 18(a) and one particular date where the respondent's admit the breach took place was on 29 May 2006 and nowhere in the pleaded case of the respondent has the date 12 November 2006 been mentioned for the trial court to endorse the claim and allow damages (see *Blay v Pollard and Morris* [1930] 1 KB 628; *Recaliva Design Steel (M) Sdn Bhd v Vista Access Sdn Bhd* [2008] 6 MLJ 604). That part of the judgment reads as follows:

> Once limitation set in on 12 November 2006, the plaintiff has suffered damage, as that is the date on which the plaintiff has completely lost its cause of action to recover the sum owned by SK Styrofoam.

[13] It is trite judgment must reflect the pleadings and more so when

A 'limitation' is taken as an issue. The learned authors of *Clerk & Lindsell on Torts*', (20th Ed), at p 2064 had this to say:

> As limitation is a defence, one might have expected the burden of proof to lie with the defendant. But the authorities established that the burden of proving that the case falls within the limitation period is on the claimant.

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[14] We have perused the pleadings several times but could not find the date 12 November 2006 in the statement of claim to enable the respondent to prove the cause of action falls within the limitation period. In our considered view it
C is fatal to the respondent's case.

BRIEF FACTS

[15] The respondent's cause of action against the purported debtor is for
D works carried out by the respondent. The suit was filed on 18 December 2000 and the sum claimed was RM154,283 with interest and costs ('the first suit').

[16] The first suit was filed by a different solicitor and the matter was transferred to the appellant as solicitor to take conduct of the matter after the
E first solicitor was not able to obtain summary judgment on the sum claimed.

[17] The matter was fixed for trial on 29 May 2006 but the appellant as solicitor did not attend court and the matter was struck out.

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[18] The first application to reinstate was only made by the appellant on 12 March 2009 ie about three years later and even that application was never heard on merits. For this purpose the appellant has filed an affidavit to state there was a good prospect of success. The learned judicial commissioner in his
G judgment has given great weight to this affidavit in finding the appellant liable to the full sum claimed by the plaintiff against the purported debtor. On the facts of the case taking into procedural consideration for reinstatement we do not think it should be taken against the appellant as the appellant has given reasons for doing so. On this issue the appellant also says the jurisprudence relating to 'reasonable prospect of success' was not considered and in
H consequence the judgment is perverse.

[19] A second application was made to reinstate on 29 November 2010 but it was dismissed by the learned sessions judge on the grounds of inordinate
I delay.

[20] The memorandum of appeal, inter alia, reads as follows:

> 1. The Honourable High Court erred in law and in fact in allowing the plaintiff's/respondent's claim in full for RM154,283.00 with interest at

the rate of 5% per annum from the date of this action (3.10.2012) until the date of full settlement of the judgment sum to the plaintiff/respondent and cost of RM20,000.00. A

2. The learned Judge erred in law and fact in concluding:

(a) that the plaintiff/respondent on the date where the suit against SK Styrofoam (hereafter referred to as the 'previous Suit') was struck out on 29.6.2005 did not suffer any damage yet as there still existed the opportunity to file a fresh claim against SK Styrofoam before limitation set in; B

(b) that the plaintiff/respondent first suffered damage on 12.11.2006 where the action in the previous Suit would have been statue barred; C

(c) that the plaintiff/respondent had established that it had a reasonable prospect of success in its claim;

(d) that the defendant/appellant should not have accepted the plaintiff's/respondent's brief and taken conduct of the previous Suit if the defendant/appellant thought that the previous Suit was unmeritorious or hopeless; D

(e) that the defendant/appellant need not call any other witness to prove the viability of his claim in the previous Suit; E

(f) that the plaintiff/respondent did not contribute to its own losses if any; and

(g) that there was no contributory negligence on the part of the plaintiff/respondent. F

3. In coming to the said decision, the Honourable High Court erred in law and in fact when the Honourable High Court failed to take into account:

(a) that when the previous Suit was struck out, the plaintiff/respondent could not file a fresh suit as that would have been circumventing the appeal process and thus the filing of a fresh suit would be an abuse of court process; G

(b) that the remedy available, if at all, should have been to apply to reinstate the previous Suit or appeal against the decision to strike out the previous Suit. As such, the cause of action could have accrued at the latest: H

(i) when the previous suit was first struck out on 29.5.2006; or

(ii) when the time limited for applying to set aside the striking order expired on 5.6.2006 (7 days to set aside judgment or order obtained in absence of party — Order 35 Rule 2(2)); or I

(iii) when the time limited for applying to set aside the striking order expired on 30.6.2006 (30 days to set aside judgment or order — Order 42 Rule 13).

(c) that the plaintiff/respondent did not have a reasonable prospect of success as the plaintiff/respondent did not have enough evidence to support the plaintiff/respondent's case in the previous Suit.

(d) that the plaintiff's/respondent's case would need further evidence and witnesses to prove his claim in order to establish that he has suffered damages;

(e) that from the outset, the previous Suit was a weak case and the defendant/appellant advised the plaintiff/respondent that it was going to be an uphill task to win the case;

(f) that the defendant/appellant requested from the plaintiff/respondent for further documents but the plaintiff/respondent never provided any;

(g) that since there was insufficient evidence to support the plaintiff's/respondent's case in the previous Suit, it is clear that there was no reasonable prospect for the plaintiff/respondent to succeed in the Suit, hence, the plaintiff/respondent did not suffer any damage;

(h) that the defendant/appellant had not acted wrongly in taking up the case from the previous solicitors as he has acted on the basis that evidence has acted on the basis that evidence has to be given by the defendant/ appellant to support the pleaded case.

(i) That the plaintiff/respondent was contributory negligent in not taking prudent and diligent measures to protect his own interests in the previous Suit and even though plaintiff/respondent met with the defendant/appellant several times between the years of 2006 to 2009;

(j) That the issue of contributory negligence should have been taken into account when considering the quantum of damage.

4. Based on the foregoing, the Honourable High Court misunderstood the law and/or misconceived the facts and misapplied the relevant principles and had reached a decision that was not supported by the weight of the authorities and the evidence before him and consequently erred in the exercise of its discretion.

[21] The memorandum of appeal for the cross-appeal reads as follows:

1. Due to the appellant's professional negligence, the respondent is now time barred under section 6 of the Limitation Act 1953 to claim against the purported debtor, thus suffered damages in contractual interests of 1.5% per month against RM154,283.00 from 12-11-2000 until final settlement.

2. Due to appellant's failure in discharging its professional duties, the appellant should be liable to pay the respondent the legal fees already paid.

[22] We have read the appeal records and submissions of the parties in detail. The court is grateful to learned counsel for the comprehensive submissions. After much consideration to the submission of learned counsel for the respondent, we take the view the appeal must be allowed and the respondent's cross-appeal must be dismissed. Our reasons, inter alia, are as follows:

(a) in the instant case the cause of action for professional negligence arose when the suit was struck out on 29 May 2006 and the respondent will suffer damages even to reinstate or file afresh action, though there is no assurance the matter will be reinstated or allowed to be refiled as these reliefs cannot be claimed as of right as they are only discretionary relief;

(b) the respondent only commenced the instant suit on 4 October 2012 after six years. The respondent's argument that notwithstanding the suit was struck out on 29 May 2006, it could still be filed afresh or reinstated before the cause of action in the suit expires ie on 12 November 2006 has no merit. This is not a case of latent defect and even English cases which relied on Latent Damage Act 1986 such as *Nykredit* which was relied on in the judgment must be read with caution as we do not have equipollent section in our Limitation Act. In *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784, the Court of Appeal in considering similar issues but not one of 'striking out' had held, inter alia, as follows:

> (2) In Malaysia, the only test to ascertain limitation is housed in s 6 of the Act which provides that limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage.
>
> (4) A cause of action in tort accrued when the appellant suffered damage. Applying the salient authorities to the instant appeal it was clear that on the facts as pleaded the appellant would have suffered damage when the third party assignment was executed because the appellant would have on that date been encumbered with the liability of dispensing the loan to the borrower in exchange for an invalid third party assignment, that is, time started to move as from 6 April 1999,

(c) once the cause of action arose the limitation period commences and it cannot be extended by way of speculation or surmise by stating there was opportunity to refile or reinstate on or before 12 November 2006;

(d) in the instant case the cause of action for negligence by the solicitor will arise immediately upon the suit being struck out. The issue of quantum or damages is another matter. To arrest higher damages the solicitor can take remedial steps or the client can take remedial steps. That does not mean the cause of action can move to another date where legal recourse will be no more possible;

(e) cases such as *Backer v Ollard and Bentley (a firm)* (1982) 126 Sol Jo 593 and *Nykredit Mortgage Bank plc v Edward Erdman Group (No 2)* [1997]

1 WLR 1627 which the learned judicial commissioner had relied on are cases where no damages actually arose on the date of breach and damages arose subsequently in consequence of the direct negligence and those cases have nothing to do with 'loss of chance'. In cases such as in the instant case relating to solicitors negligence where the court has struck out the suit, the cause of action to 'sue for loss of chance' will commence immediately and it cannot be dependent on other factors when there is a limitation dateline in law that had to be met. Further, in the event the respondent had commenced the action within the six years period and the action was reinstated or allowed to be refiled there is nothing stopping the respondent to still proceed to claim damages for negligence in respect of all costs, etc involved; and

(f) the case of *Backer v Ollard and Bentley (a firm)* (1982) 126 Sol Jo 593 is related to direct loss of negligence and has nothing to do with 'loss of chance to sue' or 'reasonable prospect of success'. Any conveyancing practitioner in the case of *Baker* will say at the time the breach took place what will be the consequence. This cannot be done in litigation cases. Cases such as *Baker* or *Nykredit* can be distinguished. We do not think it is necessary for us to do so save to cite one or two cases which have done so. They are as follows:

(i) in *Hamlin v Edwin Evans (a firm)* (1996) 29 HLR 414, it was held:

> When the claim related to a tort in respect of negligence by error or omission, the claim was for damage generally and there could only be a single cause of action. This accrued when the damage occurred and the amount of damage, its varying degrees of seriousness and its discovery at different stages made no difference.

(ii) in *Watkins v Jones Maidment Wilson (a firm)* [2008] PNLR 23; [2008] EWCA Civ 134, the court held in dismissing the appeal:

> If the advice had not been negligent, W would have had the chance of negotiating a better agreement. That chance was an asset with a measurable value. Its absence meant that there was an immediate loss, *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (Interest on Damages)* [1997] 1 WLR 1627 distinguished. It was not possible to say that there were two causes of action in law: one which accrued immediately the contract was entered into and was accepted to be statute-barred, and another residual claim for the loss of a chance. The alleged negligent advice led to W's entry into the transaction. The cause of action was then complete. Even if the advice should have included advice to renegotiate the agreement, it was that same event which constituted the breach of duty, *Hamlin v Edwin Evans (A Firm)* 80 BLR 85 applied. The claim for damages for loss of the chance of renegotiation was merely an alternative or additional head of loss. (2) The fact that clause 21(ii) could not be used before August 31, 1998

and could only be used if the builder failed to complete by that date did not mean that it did not have a value prior to that date. Although its value depended on a number of factors including the likelihood of W being able to exercise it after August 31, 1998, it had a value before that date, *Law Society v Sephton & Co* [2006] UKHL 22; [2006] 2 AC 543 distinguished. When W entered into the building agreement they acquired a bundle of rights. On W's case that bundle of rights was of lesser value than they were led to believe that it would be. Those rights were an asset capable of valuation. Thus W suffered measurable loss when they acted on the allegedly negligent advice to enter into the later transaction. Accordingly, that claim was statute-barred. (3) The judge had been entitled not to answer further preliminary issues. That was a case management issue and the appeal court would not interfere unless the judge was clearly wrong. That had not been demonstrated.

[23] Learned counsel on the issue of 'reasonable prospect of success' and 'loss of chance' says:

10. It is the appellant's contention that although the respondent suffered damage on the day the previous suit was struck out, there was no actual loss as the previous claim would not have succeeded at trial. The respondent is claiming that he lost the opportunity to sue SK Styrofoam for the outstanding payment but it remains doubtful based on the evidence adduced at trial that the respondent would have been able to claim any amount let alone the full sum of RM154,283.

11. It is not enough to claim that there were prospect of success in the previous claim. There must be a reasonable prospect of success for the court to find that there is a 'real and substantial' loss of chance. In the case of *Mount v Barker Austin (a firm)* [1998] 14 LDAB 98; [1998] PNLR 493 Simon Brown LJ said:

With these considerations in mind I would state the applicable principles as follows:

> (1) The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counterclaim) he has lost something of value ie his claim (or defence) had a real and substantial rather than merely a negligible prospect of success ...
>
> (4) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospect of success had the original litigation been fought out.

12. The determination of whether there is a 'real and substantial' chance should depend on the facts on each case. It is evident from the notes of proceedings that the appellant requested more evidence from the respondent but the requests fell on deaf ears. The respondent could only provide unsigned minutes of site meetings and a few invoices. Although the respondent

claimed that there was photographic evidence but such evidence was never given to the appellant nor was it tendered at trial. Further, the respondent could not call upon any witnesses, not even his employees to take the stand and confirm that works had been done for SK Styrofoam. With such flimsy evidence, the respondent did not have any reasonable prospect of success in its claim let alone a 'real and substantial' loss of chance in litigation.

13. Since the respondent could not prove that he had a reasonable prospect of success and lost a 'real and substantial' chance in litigation, he is not entitled to the general and specific damages. In the case of *Kitchen v Royal Air Forces Association and others* [1958] 2 All ER 241 Parker LJ said: 'If the plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted'. In other words, unless the court is satisfied that her claim was bound to fail, something more than nominal damages fall to be awarded.

14. Even if it is established that there was a loss of chance, the court should then proceed to assess the value of the loss of chance as best as it can be based on solely on the evidence tendered before the court. As in *Mount v Barker Austin*, Lord Evershed MR said: 'In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can.

15. Thus, the trial judge erred in awarding the full sum of RM154,283 to the respondent without assessing the value of the loss of chance in this case. There are endless possibilities in a litigation suit such as a settlement, withdrawal, the claim being struck out by SK Styrofoam and even if it did go for trial, there is no guarantee that the outcome would be favourable to the respondent.

[24] We find the appellant's submission on limitation as well as other issues has merit, though the learned judicial commissioner was correct in finding the appellant negligent in his retainer, and the disciplinary board had dealt with the indiscipline. As we said earlier the learned judicial commissioner judgment was commendable even though there were no sufficient authorities to assist the trial court on the issue relating to when the cause of action will arise when the suit is struck out. We did not also have the benefit of local cases on point, but we are of the considered view that the cause of action such as the instant case will arise when the suit is struck out. The test really is whether or not the respondent could have initiated an action within the limitation period. In our considered view the respondent could have.

[25] For reasons stated above, we take the view the appeal must be allowed and the decision of the High Court must be set aside. This is a fit and proper case where the costs here and below should be paid by the appellant to the respondent on the basis that the appellant has been found negligent. We fix costs at RM100,000 here and below, to be paid by the appellant to the respondent. The deposit to be refunded to the appellant.

[26] We hereby order so.

Appeal allowed and cross-appeal dismissed with costs of RM100,000.

Reported by Kanesh Sundrum